Filed 9/29/03 In re John C. CA6

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

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| In re JOHN C., a Person Coming Under the Juvenile Court Law. | H025073<br>(Santa Clara County<br>Super. Ct. No. JD11670) |
| SANTA CLARA COUNTY DEPARTMENT OF FAMILY AND CHILDREN'S SERVICES,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>THERESA C. et al.,<br><br>Defendants and Appellants. | |

Theresa C., and Steven C., the parents of a dependant child, John C., appeal from a juvenile court order terminating their parental rights (Welf. & Inst. Code, § 366.26, subd. (i);[1] Cal. Rules of Court, rule 39.1A). The parents contend that the court erred when it terminated their parental rights. Among their claims is that the court improperly found John to be adoptable and that it erred in finding that the statutory exception to adoption for a beneficial parent/child relationship did not apply. The mother additionally

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise specified.

asserts that the court erred in denying her section 388 petition, that the court should have applied the sibling exception, that it improperly admitted a social worker's report at the end of trial and that the adoption assessment was incomplete. Finding no error, we affirm the order.[2]

## FACTS AND PROCEDURAL BACKGROUND[3]

"John . . . first became a dependant child at the age of three when Theresa was arrested for being under the influence of methamphetamine. On that occasion, witnesses had seen Theresa injecting herself with drugs in front of John. Theresa had a lengthy criminal record for drugs and theft and was a registered narcotics offender. She was also diagnosed with bipolar disorder and with Hepatitis C.

"Despite the fact that Theresa had previously lost custody of five children, including two through dependency proceedings, she received reunification services for John after John was placed in the care of his paternal aunt and uncle.[4] Except for a short period of time when John went to live with his father, he [lived] with his aunt and uncle throughout the dependency and has had fairly regular visits with Theresa, including overnight visits."

Like Theresa, Steven also received reunification services. Steven's reunification plan required him to participate in, among other things, drug treatment and testing and a 52-week batterer's program. However, Steven's progress in the batterer's program was

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[2] Theresa C. separately seeks a writ of habeas corpus, or alternatively a petition for writ of mandate which we agreed to consider with his appeal. This petition is denied under separate order.

[3] The quoted material in this section are taken from our prior opinion *In re John C.* (Apr. 2, 2003, H024445) [nonpub. opn.].

[4] John is the only child Theresa had with Steven. Theresa and Steven had a history of domestic violence and divorced during the course of the dependency.

reported to be unsatisfactory because his potential for violence had apparently increased and ultimately he was terminated from the program.

After a number of successful unsupervised overnight visits with Steven and because of their apparent bond, the Department of Family and Children Services (Department) returned John to his father's care where he lived for over seven months. However, the Department removed John from Steven's home after John reported that Steven had hit him on the hands to discipline him and yelled at him. John asked to be removed from Steven's care and stated that he did not want to visit him. John's also reported that sometimes he got scared when in the car with Steven. Although John's visits with Steven continued, family members now supervised the visits.

"At the beginning of the dependency, John was described as a normal, healthy boy who related well to both adults and children, and showed no fear of either parent. Living at his uncle's house, John was well behaved, but repeatedly expressed his desire to live with his parents. By the time of the 18-month review, John's therapist had diagnosed him with post-traumatic stress syndrome because of repetitive exposure to domestic violence and substance abuse when living with his mother. While the therapist confirmed that John had a strong bond with his mother, she recognized the instability created in John's life because of ongoing conflict between John's uncle and Theresa."

"The social worker also expressed growing concern over Theresa's ability to parent John and to remain sober and follow her medication regimen. Theresa had four 'no-shows' and dilute specimens in her drug testing and had appeared to be 'very manic' and 'somewhat out of control.' The social worker observed that Theresa lacked discretion when interacting with John's father in front of John. She also believed that Theresa was exposing John to inappropriate adult information by treating John like a friend with whom she could be open and honest. Several specific incidents were of particular concern to the social worker. During one visit, Theresa failed to care for John's fever. During another visit, Theresa burned John with a cigarette, which she

initially admitted, but later denied. Theresa also dismissed John's fears of his older brother Bubba as unfounded. According to the social worker, Theresa did not appear to appreciate John's need for a secure and stable environment. Because of Theresa's attitude and conduct, by the 18-month review, the [Department] recommended terminating services. The social worker concluded that it would be 'completely unsafe and unfair to return John to his mother.' She further opined that John was 'in definite need of permanence and a caring, supportive environment where people care for him.' Based on this evidence and the court's serious concerns over Theresa's credibility, the juvenile court terminated reunification services [for both parents] and set a section 366.26 hearing. [Neither parent appealed] this order.

"After the juvenile court terminated services and reduced visitation, visits between John and his mother deteriorated quickly. On one occasion, Theresa allegedly told John to lie and tell everyone that his aunt had burned him. However, a medical examination revealed that John was not burned at all, and the following day John recanted and told the social worker that his mother had told him to lie. When John began wetting his pants and smearing feces on the wall, the Department petitioned the court to reduce visitation contending that visits with his mother were becoming increasingly stressful for John. After a contested hearing, the court found that visits were harmful to John and ordered all visits between John and his mother to stop pending the section 366.26 hearing." Despite the termination of visits with his mother, John continued to visit with his father.

After services were terminated, but before the section 366.26 hearing, John's placement with his paternal uncle and aunt failed. John's aunt, who also suffered from bipolar disorder, was suffering increased depressive episodes, making her unable to care for John. The alleged threats and disturbing messages from John's parents also allegedly contributed to the failure. John went to the emergency shelter, then to a home placement, and then back to the shelter when the placement failed.

Both Theresa and her adult son, Lewis S. (aka Bubba), filed section 388 petitions requesting custody of John. The hearings on these petitions were continued to be heard at the same time as the contested section 366.26 petition. After hearing evidence at the contested hearing, the court denied both the mother's and brother's petitions and terminated parental rights for both parents. This appeal ensued.[5]

## DISCUSSION

### *The Mother's Section 388 Petition*

Theresa contends that the juvenile court erred in denying her section 388 petition. A party filing a section 388 petition, bears the burden of showing both that a change of circumstances exists, and that the proposed change is in the minor's best interest. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47; *In re Michael B.* (1992) 8 Cal.App.4th 1698, 1703.) The question of whether to grant or deny a section 388 petition is within the sound discretion of the juvenile court, and we review the denial of a section 388 petition to determine whether there has been an abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.)

Here, while there was evidence that the circumstances had changed for John in relation to the failure of his long term placement, there was little evidence that the circumstances which had brought and kept John in the dependency system had sufficiently changed or that placing John with Theresa would be in his best interest.

Theresa contends that the reasons for the dependency, the domestic violence and substance abuse problems, have been resolved. In support of her petition, she presented evidence attesting to the fact that she was sober and stable on her medication. Additionally, she and Steven were divorced and apparently cooperative in their interactions. However, the parents had a history of domestic violence, Steven had been terminated from the domestic violence program and he was opposed to placing John with

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[5] Lewis S.'s section 388 petition is not the subject of this appeal.

Theresa. These conditions did not bode well for their future relationship if John were returned to Theresa's care. Even assuming that Theresa's personal conditions which had brought about the dependency had been completely resolved, there was no evidence that Theresa's ongoing conflict with family members, which led, at least in part, to the termination of visitation with John as well as to the failure of his placement had been resolved.

John's therapist specifically stressed his need for a calm consistent environment. She explained that John had successfully stopped exhibiting symptoms of Post Traumatic Stress Disorder, but the symptoms could reappear if he were not in such an environment. The evidence before the juvenile court showed that the conflict between Theresa and other family members continued as long as John resided with the paternal family and may even have continued after John was removed from the relatives' home. Even though Theresa contends that the conflict had subsided after services were terminated, the court was justified in concluding that the ongoing conflict within the family when John lived with them, requiring family members to interact, posed a risk that John's post traumatic stress disorder symptoms would reappear if he were returned to Theresa's care. This risk supports the court's finding that placing John with Theresa was not in his best interest. Therefore, the court did not abuse its discretion in denying the mother's section 388 petition.

***Adequacy of the Assessment Report***

Theresa complains that the adoption assessment report failed to comply with the statutory requirements of section 366.22, subdivision (b). By failing to raise the adequacy of the report below, Theresa waived this issue. (*In re Urayna L*. (1999) 75 Cal.App.4th 883, 886.) "[A]ny other rule would permit a party to trifle with the courts by standing silently by, thus permitting the proceedings to reach a conclusion in which the party could acquiesce if favorable and avoid if unfavorable. [Citation.]" (*Ibid*.)

Theresa contends that she did object to the adequacy of the assessment report by pointing to a statement she made near the end of the proceedings, wherein she said, "there is no current assessment as to mother nor any current evidence of mother being a detriment, . . ." This statement, made in final argument, does not challenge the adequacy of the assessment report at all. In fact, Theresa was arguing that her condition had not recently been evaluated. Her current condition and any detrimental effect she had on John was only relevant to her section 388 petition, not to the adoption assessment report. Having failed to object to the report itself, she has waived that issue on appeal.

***Adoptability***

Both parents challenge the juvenile court's finding that John was adoptable. The juvenile court may terminate parental rights only if it determines by clear and convincing evidence that it is likely the child will be adopted within a reasonable time. (§ 366.26, subd. (c)(1); § 366.22 subd. (b)(6); *In re Jennilee T.* (1992) 3 Cal.App.4th 212, 223.) In making this determination, the juvenile court must focus on the child, and whether the child's age, physical condition, and emotional state may make it difficult to find an adoptive family. (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649; *In re Jeremy S.* (2001) 89 Cal.App.4th 514, 523.) In reviewing the juvenile court's order, we determine whether the record contains substantial evidence from which a reasonable trier of fact could find clear and convincing evidence that John was likely to be adopted within a reasonable time. (*In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1153-1154; § 366.26, subd. (c)(1).)

At the time of trial, John was six and residing at the children's shelter. The Department's social worker, the District Attorney's social worker as well as John's long-term therapist agreed that John was adoptable, characterizing him as a typical six-year-old child. He was a healthy attractive blond haired blue-eyed child who was very cheerful and loving. His uncle described him as a "doll, " who is "vibrant," "full of

energy and love and compassion," and who has a mind which is "just unbelievable." All of these factors support the juvenile court's finding that John was adoptable.

The parents attempt to characterize John as unadoptable, citing problems with his behavior in a foster home placement, such as stealing, aggression toward younger children in the home, failure to follow the foster mother's directives and making racial slurs. According to the social worker, however, those behaviors were a direct reaction to that placement which was not a good fit for John, and the professionals familiar with John's behavior, all agreed that any problems he had, such as eneuresis were not significant and were merely part of John's adjustment reaction.

The parents also contend that John's failed placements are evidence that he is not adoptable. However, the current existence or non-existence of a proposed adoptive family is only one factor to be considered by the court, but is not itself determinative of the child's adoptability. (*In re David H.* (1995) 33 Cal.App.4th 368, 378.) While John has had failed placements, the parents cannot rely on failed relative placements, for which they were, at least partially, responsible, to support their contention that John is not adoptable. Further, the recent foster placement which failed had always been intended as only a temporary arrangement while an adoptive placement could be identified. In fact, at the time of the section 366.26 hearing, an adoptive family had been identified and John was transitioning into the family.[6] Therefore, substantial evidence supported the juvenile court's determination that John was adoptable.

***Section 366.26 (c)(1) Exceptions***

The parents next claim that the juvenile court erred in terminating parental rights because it failed to consider and apply the exceptions found in section 366.26, subdivisions (c)(1)(A) and (c)(1)(E).

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[6] The parents' motion to consider additional evidence of the section 366.3 report is denied. (*In re Zeth S.* 31 Cal.4th 396, 413-414.)

**A.** ***The Section 366.26, Subdivision (c)(1)(E) Exception***

This exception is inapplicable under the facts of this case, despite the mother's contention to the contrary. Section 366.26, subdivision (c)(1)(E) provides an exception to termination of parental rights where termination would cause a substantial interference with the sibling relationship. "If termination will substantially interfere with the sibling relationship, section 366.26, subdivision (c)(1)(E) lists numerous factors the juvenile court is to consider in determining whether the circumstance of any given case warrant the application of the exception. First a juvenile court must consider the nature and extent of the relationship, including, but not limited to, factors such as 1) whether the child was raised with a sibling in the same home, 2) whether the child shared significant common experiences, or 3) whether the child has existing close and strong bonds with a sibling. If the relationship exhibits some or all of these factors, the juvenile court must then go on to balance any benefit, emotional or otherwise, the child would obtain from ongoing contact with the sibling against the benefit of legal permanence the child would obtain through adoption. [Citations.]" (*In re Erik P.* (2002) 104 Cal.App.4th 395, 403; § 366.26, subd. (c)(1)(E); see *In re L.Y.L,* (2002) 101 Cal.App.4th 942, 949.)

As an initial matter, terminating the mother's parental rights, here, does not directly interfere with the sibling relationship; just as retaining parental rights would not necessarily preserve the sibling bond. Although Lewis S., John's half-brother, maintains a social relationship with the mother, he is an adult and does not live with her. Theresa's parental rights over Lewis were terminated well before John was born. "Where the parents' continuing relationship with the dependant child, or absence thereof, can in no way affect the nature of the sibling relationship because the parent no longer has a relationship with the sibling, the exception does not apply." (*In re Erik P. supra,* 104 Cal.App.4th at p. 403)

Even if the exception were applicable, the facts of this case would not compel its application. The brothers never shared a home and had no shared family history. The

contacts the two had during the dependency were not positive based on John's own comments. John reported that Lewis had been rough with him, had wrestled with him and hit him. John also reported being scared when Lewis drove because he drove too fast. Finally, John had not recently asked about his brother. Given the nature of their relationship, there is no evidence that John would suffer detriment from its loss, and any loss he did suffer would not outweigh the benefit he would receive from the stability of being adopted. (*In re Megan S.* (2002) 104 Cal.App.4th 247.) The court did not err in failing to apply the sibling exception here.

**B.** ***The Section 366.26, Subdivision (c)(1)(A) Exception***

The parents further contend that the trial court erred in failing to apply the section 366.26, subdivision (c)(1)(A) exception. Section 366.26, subdivision (c)(1)(A) provides that the court may not terminate parental rights if the parent has "maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(A).) In a hearing on a section 366.26 petition, once the Department has shown by clear and convincing evidence that it is likely the child will be adopted, the burden shifts to the parents to prove that the exception applies. (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1344; *In re Autumn H.* (1994) 27 Cal.App.4th 567, 574 (*Autumn H.)*; *In re Cristella C.* (1992) 6 Cal.App.4th 1363, 1372-1373.) Although the statute does not define the precise nature of the " 'benefit' " necessary in order for the exception to apply, it is well settled that the benefit must derive from the parent/child relationship, such that the child would suffer detriment from its loss. (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418 (*Beatrice M.*).) Neither parent is able to establish the type of relationship required by the statute.

It is undisputed that both parents participated in substantial visitation during the dependency, including overnight visits. It is also largely undisputed that John had a significant attachment to his mother. However, both John's therapist and social worker characterized the attachment as an unhealthy one. The evidence supports this

characterization. The visits between Theresa and John were causing John so much harm, that the juvenile court felt compelled to terminate visitation shortly after the termination of services. Since that time, John had adjusted well to not seeing his mother, and he did not appear to suffer any set backs from the suspension of visits.

In order to support the application of the exception, the parent/child relationship must promote the growth and well being of the child to such a degree that it outweighs the well being the child would gain in a permanent home with a new, adoptive parent. (*In re Lorenzo C. supra,* 54 Cal.App.4th at p. 1342.) Given the evidence that John's relationship with his mother had caused him more harm than good, the court was justified in concluding that despite their bond, any benefit from the relationship could not outweigh the benefit that a permanent stable home could provide.

John's relationship with Steven was not sufficiently substantial to warrant the application of the section 366.36, subdivision (c)(1)(A) exception either. To establish a parent/child relationship, a showing of "frequent and loving contact" is not enough. (*Beatrice M, supra*, 29 Cal.App.4th at p. 1411.) There must be a "substantial, positive emotional attachment" between the parent and the child. (*In re Lorenzo C. supra,* 54 Cal.App.4th at p. 1342; see also *Autumn H., supra,* 27 Cal.App.4th at p. 575.) John had lived with Steven during the dependency, but had to be removed when John reported that his father yelled at him and hit him. At that time John did not want to visit with his father under any circumstances. Although regular supervised visitation continued after the Department removed John from his father's home, pleasant weekly one hour visits are insufficient to outweigh the benefit of an adoptive placement for John under the circumstances. The court did not err in refusing to apply this exception.

***Evidentiary Issues***

Finally, the parents complain that the court's decision to admit the Department's rebuttal report at the conclusion of the section 366.26 hearing, without giving them an opportunity to cross-examine witnesses on its contents, was error. They contend that the

report was not admissible and that its admission violated their due process rights. There is no merit to these contentions.

Generally, the trial court has the discretion to control the evidence presented at trial and to limit the witnesses called. (Evid. Code, § 352.) Here, the juvenile court exercised its discretion to admit the rebuttal report without allowing the parents to cross-examine the social worker or other witnesses quoted in the report. While a social worker's report is not admissible without opportunity to cross-examine at earlier stages of the dependency, (Evid. Code, § 352; *In re Amy M.* (1991) 232 Cal.App.3d 849) no such prohibition exists for a subsequent section 366.26 hearing. The report was, therefore, admissible even absent an opportunity to cross-examine on its contents.

The next question is whether, despite its admissibility, the parents' due process rights required the court to allow cross-examination on its contents. "Of course a parent has a right to 'due process' at the hearing under section 366.26 which results in the actual termination of parental rights. This requires, in particular circumstances, a 'meaningful opportunity to cross-examine and controvert the contents of the report.' [Citations.] But due process is not synonymous with full-fledged cross-examination rights. [Citation.] Due process is a flexible concept which depends upon the circumstances and a balancing of various factors. [Citation.] The due process right to present evidence is limited to relevant evidence of significant probative value to the issue before the court. [Citations.]" (*In re Jeanette V.* (1998) 68 Cal.App.4th 811, 816-817.) In *In re Jeanette V.*, the court held that it was not a violation of a parent's due process rights to refuse a request to cross-examine a social worker on the contents of her section 366.26 report where the parent's offer of proof showed that the proposed subject of the cross-examination was irrelevant to the issue before the court. (*In re Jeanette V., supra,* 68 Cal.App.4th at p. 817.)

Here, although relevant to the issues before the court, the rebuttal report only addressed specific issues raised during the section 366.26 hearing, issues about which

there had already been considerable testimony. The court balanced the due process considerations with the need to conclude the proceedings and determined that allowing the rebuttal report was the most efficient way to proceed. The court concluded that it was "going to do this in the most efficient way possible. If there is rebuttal to your case and you wish to respond -- I am solicitous of your time constraints and trying to meet it. I'm not trying to throttle anybody in presentation. There are a lot of words. I'm listening. And yet people have jobs and need to get on with it." Because of the significant amount of evidence presented during the hearing, the court did not violate the parents' due process rights by not giving them an opportunity to cross-examine the social worker on the rebuttal report.

The parents' reliance on *In re Matthew P.* (1999) 71 Cal.App.4th 841, is misplaced. In *In re Matthew P.* the juvenile court refused to allow any hearing on the de facto parents' section 388 petition. In finding a due process violation, the *Mathew P.* court held that due process "required the juvenile court to conduct a full hearing rather than limiting it to declarations under the court rules." (*In re Matthew P., supra,* 71 Cal.App.4th at p.851.) Here, there were many days of testimony prior to the submission of the rebuttal report. Therefore, unlike in *Mathew P.* the parents were not completely deprived of an opportunity to be heard. *(Ibid.*)

Finally, the parents complain that the court erred in admitting the report in the first instance because it was not timely. California Rules of Court, rule 1463(4)(c) requires that "Before the hearing, petitioner must prepare an assessment under section 366.21[,] [subdivision] (i). At least 10 calendar days before the hearing the petitioner must file the assessment, . . ." (Cal. Rules of Court, rule 1463(4)(c).) There is no question that that Department prepared and timely filed the section 366.21, subdivision (i) assessment at least 10 days before the hearing. The rebuttal report was not an assessment report, but a report filed at the specific direction of the court which was acting within it discretion to control the flow of evidence before it. (Evid. Code, § 352; see *People v. Gurule* (2002)

28 Cal.4th 557, 620.) Therefore, it was not error to allow the report to be filed after the conclusion of the hearing.

## DISPOSITION

The order appealed from is affirmed.

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

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BAMATTRE-MANOUKIAN, J.